

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

UNITED STATES OF AMERICA

V.

CRIMINAL NO. 2:01CR049-B-B

TONY NEELY

MEMORANDUM OPINION

This cause comes before the court on the defendant's motion to suppress filed on November 8, 2001. The court took the motion under advisement following an evidentiary hearing on February 4, 2002. Having duly considered the parties' memoranda, testimony, exhibits and post-hearing submissions, the court is ready to rule.

The indictment charges the defendant with armed bank robbery, unlawful carrying, use, brandishing and discharge of a firearm and unlawful possession of a firearm under 18 U.S.C. §§ 2113(a) and (d), 924(c)(1)(A), 922(g) and 924(a)(2). The defendant moves to suppress certain items of clothing, results of a chemical analysis of the seized clothes and gun powder residue test results as evidence illegally obtained from a warrantless search and seizure. Katz v. United States, 389 U.S. 347, 357, 19 L. Ed. 2d 576, 585 (1967) (Fourth Amendment requirement of reasonableness presumes probable cause and a warrant). In the absence of a warrant, the prosecution has the burden to prove the legality of the search and seizure. U.S. v. Roch, 5 F.3d 894 , 897 (5<sup>th</sup> Cir. 1993).

It is undisputed that the evidence was obtained without a warrant. On November 9, 2000, the defendant, suffering a gunshot wound to his chest, was transported by ambulance to The Med, a regional trauma center in Memphis, Tennessee, for emergency treatment. On the same day approximately thirty minutes before the assistance call, a bank robbery occurred at Trustmark Bank in Southaven, Mississippi, located in close proximity to the apartments where the defendant's injury was reported to Memphis 911

Service. The defendant's clothes were cut from his body before surgery and stored by hospital personnel. Following his surgery on the same day, the defendant was formally placed under arrest and housed in the prison wing of the hospital.

Before the defendant was formally arrested, a law enforcement officer obtained the defendant's clothes from hospital personnel. The government asserts that after locating a bank bag stained with red dye outside the apartment from whence the defendant was picked up by the ambulance, a police officer "was in the process of obtaining a warrant for Neely's arrest" while "[a]nother officer was dispatched to The Med to obtain Neely's clothing." The court rejects the government's contention that decomposition of the defendant's clothes created an exigent circumstance justifying immediate seizure of the defendant's clothes without a warrant; the government contends that the officer obtained the clothing "to insure that it was not destroyed or its evidentiary value diminished by the medical procedures or hospital environment."

The court does adopt the government's theory that the defendant had no reasonable expectation of privacy to his clothes while in the possession of the hospital where he voluntarily submitted himself for medical treatment wearing his bloody clothes. In order to establish the existence of a Fourth Amendment right, the defendant has the initial burden of proving by a preponderance of the evidence<sup>1</sup> that he personally had a subjective, legitimate and reasonable expectation of privacy in the place searched and the objects seized. Minnesota v. Carter, 525 U.S. 83, 88, 142 L. Ed. 2d 373, 379 (1998); U.S. v. Cardoza-Hinojosa, 140 F.3d 610, 614 (5<sup>th</sup> Cir.), cert. denied, 525 U.S. 973, 142 L. Ed. 2d 348 (1998). The defendant's clothes were removed and stored by hospital personnel in a medically necessary and customary manner and not at the direction of law enforcement officers.

The court further finds that the chemical analysis of the defendant's clothes to detect any red bank dye or tear gas, components of bank dye packs, constitutes a reasonable search incident to the

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<sup>1</sup>United States v. Vega, 221 F.3d 789, 795 (5<sup>th</sup> Cir. 2000), cert. denied, 531 U.S. 1155, 148 L. Ed. 2d 975 (2001).

defendant's lawful arrest. See United States v. Robinson, 414 U.S. 218, 235, 38 L. Ed. 2d 427, 440-41 (1973) ( a search incident to a lawful arrest, i.e., an arrest based on probable cause, "is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment"). It appears to the court that for all practical purposes the defendant was under arrest or about to be placed under arrest without the benefit of the evidence derived from the defendant's clothes. The court finds that the officer had probable cause to arrest the defendant prior to seizure of his clothes. For purposes of reasonableness, a search incident to an arrest may occur prior to a formal arrest made within reasonable proximity to the search. Rawlings v. Kentucky, 448 U.S. 98, 111, 65 L. Ed. 2d 633, 645-46 (1980); United States v. Hernandez, 825 F.2d 846, 852 (5<sup>th</sup> Cir. 1987), cert. denied, 484 U.S. 1068, 98 L. Ed. 2d 996 (1988).

Shortly after the defendant was formally placed under arrest in his post-surgery hospital room, officers of the Memphis Crime Scene Investigation Division conducted an atomic absorption test of the defendant's hands to detect the presence of gun powder residue. The procedure was non-invasive, painless and required no oral statement from the defendant. The court finds that the gun powder test was a reasonable search incident to the defendant's lawful arrest. United States v. Love, 482 F.2d 213, 216-18 (5<sup>th</sup> Cir. 1973) (swabbings of bombing suspect's hands with acetone solution were a search and seizure incident to arrest).

For the foregoing reasons, the court concludes that the defendant has failed to establish a Fourth Amendment violation. Therefore, the motion to suppress is not well taken and should be denied.

An order will issue accordingly.

THIS, the \_\_\_\_\_ day of February, 2002.

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NEAL B. BIGGERS, JR.  
SENIOR U. S. DISTRICT JUDGE

